

Issued February 21, 1913.

United States Department of Agriculture,

OFFICE OF THE SECRETARY.

NOTICE OF JUDGMENT NO. 1949.

(Given pursuant to section 4 of the Food and Drugs Act.

ALLEGED MISBRANDING OF OIL.

On December 15, 1910, the United States Attorney for the Southern District of New York, acting upon a report by the Secretary of Agriculture, filed in the Circuit Court of the United States for said district an information against Henry Von Bremen, Frank MacMonnies, and William Von Elm, doing business under the firm name and style of Von Bremen, MacMonnies & Co., New York, N. Y., alleging the shipment by them, in violation of the Food and Drugs Act, from the State of New York into the State of Texas, of a quantity of oil which was misbranded. The product was labeled: "Imported Salad Oil Morel Brand."

Analysis of a sample of the product by the Bureau of Chemistry of this Department showed the following results: Specific gravity 15.6° C./15.6° C., 0.9220; refractive index 25° C., 1.4711; 15.6° C., 1.4746; iodine number 106.3; free fatty acids (as oleic) 0.76 per cent; Halphen test, negative; Renard test, negative; Villavecchia test, positive; Villavecchia test, positive with a 1 per cent mixture of the sample in pure olive oil. Intensity of reaction about equal to that of pure sesame oil. Misbranding of the product was alleged in the information for the reason that the label upon the can regarding the substance and ingredients contained therein was false and misleading, in that said label would indicate that the product was olive oil, whereas in truth and in fact it was not olive oil but was sesame oil. Misbranding was alleged for the further reason that the product was labeled and branded so as to deceive and mislead the purchaser into believing that the product was olive oil, whereas in truth and in fact it was not olive oil but was sesame oil.

On December 20, 1910, the defendant entered a plea of not guilty and on the same date a jury was impaneled and evidence was submitted. At the conclusion of the taking of testimony the evidence was summed up to the jury by counsel for the Government and

defendants and thereupon the court (Hough, J.) charged the jury as follows:

Gentlemen, in taking up this, the last case of our session together, I shall not waste time in speaking to men who have been here before me for nearly three weeks, regarding the burden of proof, presumption of innocence and nature of reasonable doubt. I take it for granted that you understand those matters. And also at the session now ending probably every one of you has heard enough about the Pure Food Act to approach your Christmas dinner with greater caution, if not greater intelligence; and, therefore, I shall only point out that this indictment comes under what is commonly called the misbranding section of the act.

These defendants sent from New York to Galveston in interstate shipment, an article which bore on its exterior just these words "Imported Salad Oil, Morel Brand." That article is said by the Government to have been misbranded, which the act declares, shall mean (among other things) this: Any article of food, the label on which shall bear any statement regarding such article of food, that is false or misleading in any particular. Such statement constitutes a misbranding of the article of food. Now, the Government in this information asserts that this label by the use of the words "Imported Salad Oil" without more, did contain a statement both false and misleading. False means, of course, untrue. Misleading means calculated to deceive, actually tending to deceive. I do not think either word is at all difficult to understand.

Therefore, of course, the first inquiry is, what does salad oil mean? Now, without any reference to dictionaries (about which a great deal has been said), it seems to me that the evidence adduced here, shows that there was a time not within the memory of some of the younger of us when salad oil meant olive oil, and it did not mean anything else. Therefore, you may assume that the first,—original,—or *prima facie* meaning of the words "salad oil" was olive oil.

But that phrase, like any other, may acquire in time, and be used in, a trade, a commercial, a secondary, or a wholly new, meaning by the public. Now, that is the inquiry for you, viz.: Whether salad oil has acquired a new or secondary meaning.

If so, what is it? The defendants say that the words "salad oil" has now come to mean an oil which serves for salad as indeed does olive oil in some of its preparations, but which is not necessarily olive oil; and in its trade signification in the United States is not olive oil at all, but an oil made from cotton, sesame, peanuts, and perhaps, quite recently, Indian corn. The question is not whether sesame oil, and cotton seed oil and peanut oil are good to eat; if we want to eat those articles, we can eat them all we like; the question is merely about this label.

What is the effect as reasonably judged by reasonable men of that particular label, upon the public? Is that label false? That is, is it untrue, according to the understanding of the buying public? Is that label misleading, in the sense that it is calculated to deceive the buying public?

The defense practically asserts that the public has been "educated" (to use the expression of one of the defendants who went upon the stand), though not by sesame oil, which is the oil in this case. You will recall that Mr. McMonnies said the education of the public was a matter of some difficulty, but it has been educated, say the defendants, in the use of the phrase salad oil, and that education has been received from the enormous and long continued use of cotton seed oil for salad; for the purposes of olive oil; and then has been further educated by the smaller use of the other enumerated oils; until the public as represented by a fair and reasonable man recognizes, when such a man asks for "salad oil," and another person hands out to him something labeled "salad oil," that he is getting something which is not olive oil.

The prosecution, on the other hand, asserts that the public has not accepted that knowledge of the dealers. The prosecution says there was once a considerable portion of the public which consumed olive oil on salads, they called it "salad oil," and knew no other; but when ingenious manufacturers found substitutes for the original product of the olive, those dealers called their product salad oil. Now, says the prosecution, that was done in order to conceal the substitution, and incidentally, perhaps, it may be inferred to keep up the prices. I may frankly say that it seems to me admitted as proven that the sale of cheaper oils as salad oils, has long progressed in this country, has attained large dimensions; but it is nevertheless urged upon you by the prosecution that such sales and such trade however large, and however long continued, has always been based upon a misleading of the public, and still is so based.

I shall not recapitulate the evidence to you. You happen to be dealing here with a substance with which we are all more or less familiar. The question is for you as reasonable members of the public, not (so far as known) identified with or particularly interested in either the manufacture and sale or the importation and sale of any brands of oil; it is for you as reasonable members of the body of citizens who are entitled to know so far as labels can tell you what it is you are eating. Are you of the opinion;—if such reasonable representatives of the reasonable public have offered to them bottles of oil, or cans of oil,—labeled on the outside "Imported Salad Oil"; would such reasonable men be misled in this day and generation into believing that when they buy "Imported salad oil" they are buying olive oil? If on your oaths you are of the opinion that such

men would be so misled, then these defendants are guilty. If you are of the opinion that such reasonable men would not be misled, and would know or ought in reason to know that they were not getting olive oil, but were getting some other kind of oil which was suitable for salad, then the defendants are not guilty.

Mr. BOYSEN. I would like to request your Honor to charge the jury that the question for their determination is not whether isolated instances of deception of purchasers through their own carelessness or ignorance might occur through the defendants' sale of goods bearing the label in evidence, but whether that label tends to deceive the purchasing or consuming public generally.

The COURT: The question is whether that label tends to deceive a reasonably intelligent member of the public.

Mr. BOYSEN: I except.

Will your Honor charge the jury that there is no question that pure sesame oil is an oil fit for use as a salad oil and that they are to determine whether it is misbranded when branded "Salad oil." Further, that that question will depend on whether it is or is not, in the language of the statute, "An imitation of or sold under the distinctive name of another article." That they must either find that all oils, except olive oil, fit for use as salad oils are imitations of olive oil, or that the term "salad oil" is the distinctive name of olive oil, in order to convict the defendants.

The COURT: I decline that. The question for the jury is simply whether this particular label is or is not false or misleading. It is not an issue in this case whether sesame oil is pure oil or good oil or a good oil for salads. The question is as to the label, not as to the quality of the oil, although I must say that it seems to have been admitted here that sesame oil is pure oil and can be used for salads. It seems to me, as far as I recall the evidence, entirely harmless.

Mr. BOYSEN: I except to your Honor's refusal to charge as requested. I also ask your Honor to charge the jury that to find the defendants guilty, they must either find that sesame oil is an imitation of olive oil or that the term "salad oil" is its distinctive name.

The COURT: I will not charge just that. The question is whether this label is calculated by its wording or nature to deceive the public into believing that it is getting olive oil.

Mr. BOYSEN: I respectfully except.

I also ask your Honor to charge the jury that they are entitled to consider on the question of the credibility of the Government's witnesses the fact that they are all importers of olive oil, who might naturally be interested in excluding all other oils from the American salad oil market.

The COURT: Well, I think I will charge that. And I will also charge that an equal number of the defendants' witnesses are manufacturers of cotton seed oil.

Mr. BOYESEN: Yes, that is so.

Mr. STEPHENSON: I would request your Honor to charge that if the jury find that this label is either misleading or false, that they must find the defendants guilty. They don't have to find both.

The COURT: Yes; and I may add to that, that in my opinion the sum and substance of both those words, for the purposes of this case, is the same.

Mr. STEPHENSON: I ask your Honor further to charge that even if this label were not false or misleading to people in the trade, they must find the defendants guilty if they find it is false or misleading to the ordinary purchaser.

The COURT: I have so charged.

On December 21, 1910, the jury returned a verdict of guilty and thereupon the counsel for defendant moved to set aside the verdict on the ground that it was against the weight of evidence and against the law. They also moved for a new trial on all the evidence and exceptions taken throughout the case and also in arrest of judgment, which motions were denied by the court and thereupon a fine of \$50 was imposed.

On January 19, 1911, counsel for defendants sued out a petition for a writ of error upon 48 assignments of error to the United States Circuit Court of Appeals for the Second Circuit. Upon review of the case in the Circuit Court of Appeals the judgment of the lower court was reversed and the cause remanded for a new trial. The decision of the Circuit Court of Appeals (WARD, *C. J.*) follows:

This is an information under the Food & Drugs Act of June 30, 1906 against the defendants, who compose the firm of Von Bremen, MacMonnies & Company, containing two counts. The first count charges them with delivering for shipment from New York to Galveston a can bearing the label, "Imported Salad Oil Morel Brand," which was a mis-brand because it was false and misleading in that it indicated that the contents of the can was olive oil, whereas it was sesame oil. The second count charges that the same can was mis-branded in that it was labelled or branded so as to deceive and mislead the purchaser into believing that it contained olive oil, whereas it contained sesame oil.

The first count falls within the first subdivision of Section 8 of the Act as to Foods, viz., that the article "was offered for sale under the distinctive name of another article," namely olive oil. The second count falls within the second sub-division, viz., that the article was "labelled or branded so as to deceive and mislead the purchaser," namely, by making him think he was getting olive oil, whereas he was getting sesame oil.

The trial judge, taking judicial notice that standard lexicographers define the words "salad oil" as "olive oil," denied the defendants'

motion to quash the information on the ground that it alleged no offense and afterwards, it being stipulated that the can contained sesame oil and not olive oil, he denied the defendants' motion to direct a verdict in their favor. These rulings were within our decision in the *Brina* case, 179 F. R. 373. The Government thereupon rested and the defendants showed by a large number of witnesses that for some forty years a perfectly healthy oil for edible purposes had been made from cotton seed and sold in enormous quantities in this country as "salad oil" and that other edible oils were made from the seed of sesame, a kind of grass, and from peanuts and from corn and sold as salad oil. The oil in question is sesame oil imported by the defendants. The defendants also showed that olive oil is always, except perhaps in the case of one brand, labelled and sold as olive oil; that it is four times as expensive as the oils sold as salad oils and that these other oils are sold in vastly greater quantities; the American Cotton Seed Oil Company selling from 175,000 to 200,000 barrels, the Union Cotton Seed Oil Company 40,000 barrels a year of salad oil made from cotton seed.

In reply to this the Government called two purchasers of oil, Edward Nougaret, steward of the Cafe Martin (in this country a month) who testified that nothing but olive oil was used there. Francis J. Englefield, purchasing agent of the Hotel Knickerbocker, testified that nothing but olive oil is used there and that "salad" means the very best kind of olive oil. It also called three sellers of olive oil; John W. Eginton, an employee of James P. Smith & Company, who sell nothing but olive oil, testified that in his opinion "Salad oil" means olive oil; Benito Maspero, an importer of Italian olive oil, who said that in his line of business "salad oil" is generally claimed to be olive oil; Henry L. Marks, chief clerk of an importer of olive oil, testified that in the trade they supply "salad oil" means olive oil. They all said their oil was labeled olive oil.

The Act does not make the intention of the defendants material, but as the case was a criminal one, the jury was bound to be convinced beyond a reasonable doubt that the article in question was misbranded before they could find the defendants guilty. We think that the proof did not justify such a conclusion and that the defendants' motion for the direction of a verdict in their favor should have been granted.

Assuming, however, that there was enough to send the case to the jury, other errors were committed. We think it was error upon the state of facts set forth above to refuse to let the dealers in salad oil not made of olives say whether they had ever heard any complaints from purchasers to the effect that they had been misled or deceived. Such testimony would be directly relevant to the charge in the second

count that the article was branded so as to deceive or mislead purchasers.

It was also error to refuse to let large dealers in this salad oil say what the understanding of the trade was as to the meaning of the words "salad oil". It would certainly be relevant to the inquiry under the first count that the article was branded under the distinctive name of olive oil to show what the trade which buys and sells thousands of barrels of this "salad oil" a year understands by those words and it was also relevant to the inquiry under the second count because it is a fair inference that the trade does not sell salad oil to the consumer as anything else than what it really is.

So we think it was error to permit the Government to cross-examine the defendants' witnesses as to whether they thought the words "salad oil" would be less misleading if the words "pressed from cotton seed" on some of the labels were in larger type or if the cans had been labeled simply cotton seed oil. The question to be decided was whether purchasers supposed they were getting olive oil when they purchased "salad oil" and it throws no light on this to inquire whether they could have been in any doubt if the words cotton seed oil alone were used or if the words cotton seed oil were printed in large type on the label. We think the case was tried throughout a little too strictly against the defendants. The judgment is reversed. (LACOMBE, C. J.)

I concur in the conclusion to reverse, because I think some testimony was excluded which defendant was entitled to have in the case. But I am of the opinion that there was a question for the jury to pass upon and that that question was whether the article was labeled so as to deceive or mislead "the purchaser", who, in the case of a sale at retail would be one of the general public not necessarily informed as to the trade meaning of words.

On April 3, 1912, nolle prosequi was entered in the case upon motion of the United States Attorney.

WILLIS L. MOORE,
Acting Secretary of Agriculture.

WASHINGTON, D. C., October 9 1912.